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No. A-543

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

SAN JOSE UNIFIED SCHOOL DISTRICT,
CHARLES KNIGHT, individually
and as District Superintendent
of the San Jose Unified School District;
NEIL H. GEIER, JR., ELIZABETH J. ALLEN,
EDWIN P. JONES, JR., MARY K. MCCREATH,
and DONALD L. RAIMONDI,
individually and as members of the Board of
Education of the San Jose Unified School District,
Petitioners,

VS.

ARNULFO M. DIAZ and SOCORRO DIAZ,
as the parents and next friends
of FERNANDO DIAZ, MIQUEL A. DIAZ
and JUAN F. DIAZ; JOSE VASQUEZ,
as the parent and next friend of
DAVID VASQUEZ, individually and on behalf
of all other persons similarly situated,
Respondents.

On Writ of Certiorari to the United States Court of Appeals For The Ninth Circuit

REPLY BRIEF FOR THE PETITIONERS

Of Counsel:
Robert C. Post
School of Law
(Boalt Hall)
University of California,
Berkeley, CA

KEITH V. BREON
COUNSEL OF RECORD
CELIA RUIZ
EMI R. UYEHARA
BREON, GALGANI,
GODINO & O'DONNELL
22nd Floor, The Shell Bldg.
100 Bush Street
San Francisco, CA 94104
Telephone: (415) 788-4999
Attorneys for Petitioners

April 17, 1985

BOWNE OF SAN FRANCISCO, INC. • 180 NINTH ST. • S.F., CA 94103 • (415) 864-2300

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INTRODUCTION

Respondents argue that certiorari should not be granted "merely to review the peculiar facts of this particular piece of litigation." Brief in Opposition to Petition for a Writ of Certiorari ("Opp.") at 24. This case goes beyond its factual setting, however, and involves three specific errors of law in the opinion of the Ninth Circuit, errors which have implications of national importance.

I

THE NINTH CIRCUIT INFERRED UNCONSTITUTIONAL SEGREGATIVE INTENT ON THE BASIS OF AN IMPROPER LEGAL RULE WHICH, IF GENERALLY APPLIED, WILL HAVE IMPORTANT AND HARMFUL NATIONAL CONSEQUENCES

Although respondents correctly state that an inference of unconstitutional segregative intent will depend "on the totality of relevant facts and circumstances," Opp. at 23, they fail to recognize that this Court has insisted upon constitutional guidelines to determine how and on what basis such an inference can be drawn. *See, e.g., Wayte v. United States,* 53 U.S.L.W. 4319, 4322 (U.S. March 19, 1985). In particular, this Court has stressed that the "foreseeability of segregative consequences" cannot alone create an inference of unconstitutional segregative intent. *Dayton Board of Education v. Brinkman ("Dayton II"),* 443 U.S. 526, 536 n.9 (1979).

Respondents correctly quote the Ninth Circuit's observation that "[p]roof that the segregative effects of a decision were foreseeable is not to be taken, *as a general proposition,* to make out a *prima facie* case of segregative intent," Opp. at 8, *Diaz V,* App. A, A-4 (emphasis added). But respondents fail to acknowledge the Ninth Circuit's additional conclusion that where "the adverse consequences are clearly identified and repeatedly articulated to the decisionmaking body, the inevitability of the adverse effects provide a strong inference of illegitimate intent." *Diaz V,* App. A, A-4 n. 1. This conclusion creates a legal rule by which segregative intent may be inferred, and close examination of the

Ninth Circuit's opinion demonstrates that it is predicated upon the application of this rule. The Ninth Circuit's rule, however, is inconsistent with *Dayton II,* with the important distinction between *de jure* and *de facto* ethnic imbalance which this Court has repeatedly emphasized, and with the continued viability of neighborhood education in those metropolitan areas faced with *de facto* ethnic imbalance. *See* Petition for Writ of Certiorari ("Pet."), at 10-13.

II

THE NINTH CIRCUIT MISUNDERSTOOD THE LEGAL IMPLICATIONS OF A NEIGHBORHOOD SCHOOL POLICY IN A WAY THAT WILL PRECLUDE THE OPERATION OF NEIGHBORHOOD SCHOOLS IN MANY METROPOLITAN AREAS

Respondents argue that the existence of a neighborhood school policy is simply one fact to be considered in light of all the circumstances of a case, Opp. at 6, and that therefore "there is much more than adherence to a neighborhood school policy involved in this litigation; petitioners' announcement of the death of such a policy is highly exaggerated." Opp. at 14.

Respondents, however, do not deny that the Ninth Circuit ruled as a matter of law that a neighborhood school policy was legally irrelevant to various important school board decisions involving such matters as the siting of new schools, the closing of old schools, and the use of portable classrooms. *Diaz V,* App. A-7-10; *Diaz II,* App. A-106-08; Pet. at 14-18. Indeed, respondents appear to embrace and defend this ruling. Opp. at 17.

But this ruling profoundly misunderstands the nature of a neighborhood school policy, and it raises significant constitutional barriers to the continued existence of neighborhood education in metropolitan school districts faced with *de facto* ethnic separation. Pet. at 14-18. The effect of this ruling can be illustrated by the opinion of the Ninth Circuit which, as respondents stress, claimed to rest upon "the *cumulative* impact of the evidence in this case" taken "as a *whole.*" Opp. at 21. Prominent among the evidence cited by the Ninth Circuit as supporting its judgment of

segregative intent were petitioners' decisions relating to such matters as school sitings, school closings, and the use of portable classrooms. If the Ninth Circuit had applied the correct legal rule to these decisions, and viewed them as potentially justified applications of a neutral neighborhood school policy, it might well have viewed the "totality" of the evidence in a different light.

III

THE NINTH CIRCUIT IMPROPERLY APPLIED THE "CLEARLY ERRONEOUS" STANDARD OF FED. R. CIV. P. 52(a)

Respondents are unable to adduce any evidence that the Ninth Circuit fulfilled or even acknowledged its duty of deference toward the trial court's finding of fact that petitioners acted without segregative intent. Instead respondents contend that even if the Ninth Circuit accepted "the historical facts as established by the trial court," it was free to differ with the "inferences to be drawn from those facts," so long as the inferences of segregative intent drawn by the Ninth Circuit were "permissible." Opp. at 18, 20.

Respondents' accurately reflect the basis for the Ninth Circuit's opinion. This Court, however, has clearly and unequivocally rejected this position, holding that an appellate court may not use the "clearly erroneous" standard of Rule 52(a) to substitute its inferences for those of a trial court, even if the inferences of the appellate court are "permissible":

> If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous.

Anderson v. City of Bessemer City, 53 U.S.L.W. 4314, 4317 (U.S. March 19, 1985).

The Ninth Circuit never held, nor could it have held, that the inferences drawn by the trial court were "impermissible". It merely held that the trial court was incorrect in finding that petitioners had acted without segregative intent. But, as this Court has recently held, the plainly erroneous "standard does not entitle a reviewing court to reverse the finding of the trier of fact simply because it is convinced that it would have decided the case differently. The reviewing court oversteps the bounds of its duty under Rule 52 if it undertakes to duplicate the role of the lower court." *Ibid.* Maintenance of a proper respect for the "clearly erroneous" standard is particularly important in the area of school desegregation, for appellate duplication of the complex and extensive factfinding involved in these cases will cause precisely that "huge cost in diversion of judicial resources" which Rule 52 was designed to prevent. *Ibid.*

In their brief respondents attempt to reargue the facts, and cite various school board decisions which respondents claim justify the Ninth Circuit's conclusion that the trial court's judgment was clearly erroneous. But this kind of factual argumentation is irrelevant. The issue is rather whether the trial court considered each of these school board decisions, and whether the trial court's judgment that these decisions did not individually or cumulatively justify a finding of improper segregative intent is implausible or impermissible. In point of fact, the trial court did carefully and extensively consider each of these decisions, and its judgments with respect to each of them are plainly plausible and permissible.[1] Rule 52(a) requires that appellate inquiry go no further, a

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[1] The trial court's evaluation of many of the decisions mentioned in respondents' Opposition are discussed in petitioners' original brief. *See* Pet. at 18 n.17, 19-27. With respect to the trial court's discussion of the "restructuring" of the downtown junior high schools, Opp. at 13, *see Diaz III,* App. A-78-79; the trial court's discussion of QUEST, Opp. at 14, can be found at *Diaz III,* App. A-88-91, A-85-86; its discussion of the use of "double sessions," Opp. at 19, can be found at *Diaz III,* App. A-81-82, *Diaz I,* App. A-154; its discussion of the "Little Orchard neighborhood" and of the decision to permit voluntary transfers from attendance areas, Opp. at 12-13, is at *Diaz III,* App. A-72-73, A-95-97, *Diaz I.* App. A-136, A-158-61.

requirement overlooked by the Ninth Circuit and by respondents' Opposition.

CONCLUSION

For the above reasons, petitioners respectfully request that a writ of certiorari issue to review and ultimately to reverse the judgment of the Ninth Circuit Court of Appeals.

Respectfully submitted,
BREON, GALGANI, GODINO & O'DONNELL

KEITH V. BREON
KEITH V. BREON

Of Counsel:

Robert C. Post
School of Law
(Boalt Hall)
University of California, Berkeley
Berkeley, CA